



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 8, 1995

Ms. Tamara Armstrong  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR95-352

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27978.

The Travis County District Attorney's Office (the "district attorney") has received a request for records relating to an investigation of a named individual. You have released some of the requested information. You claim, however, that sections 552.101, 552.107, and 552.111 of the Government Code except the requested information from required public disclosure.

At the outset, we address your contention that some of the requested information constitutes records of the judiciary and is thus not subject to the Open Records Act. See Gov't Code § 552.003(b) (excepting judiciary from scope of Open Records Act). You advise us that the district attorney obtained some of the requested information pursuant to grand jury subpoena and claim therefore that such information falls outside the scope of the Open Records Act. In support of this contention, you refer us to Open Records Decision No. 513 (1988), in which this office concluded that the Open Records Act does not apply to grand juries, nor to records within the constructive possession of grand juries. Information may not be withheld as information in the constructive possession of a grand jury merely because the information was submitted to the grand jury for review. Open Records Decision No. 513 (1988) at 4. For the district attorney to withhold such information, the district attorney must have obtained the information pursuant to a grand jury subpoena issued in connection with the investigation. *Id.* Accordingly, any records

in the possession of the district attorney and obtained by his office pursuant to a grand jury subpoena are not subject to the Open Records Act; you may therefore withhold these records from required public disclosure. On the other hand, you may not withhold the remaining investigation records merely because they may have been considered by the grand jury.

We next address your contention that section 552.111 of the Government Code excepts some of the requested information from required public disclosure. You assert section 552.111 in conjunction with the work product doctrine. The work product doctrine applies only upon a showing of the applicability of section 552.103(a) of the Government Code. *See* Open Records Decision No. 575 (1990). You have not demonstrated that section 552.103(a) applies in this instance.

We note that the issues you raise with respect to attorney work product are the subject of pending litigation in *Holmes v. Morales*, No. 03-94-179-CV, (Tex.—App.—Austin argued Feb. 15, 1995). The district court ordered the plaintiff to release the records at issue in the litigation in compliance with rulings from this office. *See Holmes v. Morales*, No. 93-07978 (261st Dist. Ct., Travis County, Tex., Feb. 14, 1994) (copy enclosed) Thus, the attorney general has substantially prevailed in the *Holmes* litigation. *Id.* In light of the pendency of this litigation, however, it would be inappropriate for this office to rule on the claims you raise regarding attorney work product. At this point, it appears that the outcome of the *Holmes* case may determine the resolution of your claims and may moot any decision this office might reach on those claims. For these reasons, we are declining to rule on the issues you raised regarding attorney work product.<sup>1</sup>

We remind you that the attorney work product aspect of section 552.103(a) is a discretionary exception under the act. *See* Gov' Code § 552.007; Open Records Decision No. 542 (1990). Section 552.007 provides as follows:

(a) This chapter does not prohibit a governmental body or its officer for public records from voluntarily making part or all of its records available to the public, unless the disclosure is expressly prohibited by law or the records are confidential under law.

(b) *Records* made available under Subsection (a) must be made available to any person. [Emphasis added.]

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<sup>1</sup>Because we have declined to rule on your attorney work product arguments, you may withhold the requested information pending the outcome of the *Holmes* case. Therefore, we need not address your arguments under sections 552.101 and 552.107.

The district attorney may therefore choose to release to the public some or all of the requested records for which it claims protection as attorney work product.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/rho

Ref.: ID# 27978

Enclosures: Submitted documents  
*Holmes v. Morales*, No. 93-0978  
(261st Dist. Ct., Travis County, Tex.,  
Feb. 14, 1994)

cc: Mr. Steven W. Smith  
3608 Grooms Street  
Austin, Texas 78705  
(w/o enclosures)

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<sup>2</sup>Although a governmental body may choose to waive a discretionary exception such as section 552.103 for particular records, section 552.007 does not prevent a governmental body from subsequently raising the same exception when faced with a request for different records. On the other hand, once a governmental body has disclosed particular records to a member of the public, it may not ordinarily withhold the same records from public disclosure unless the information is confidential by law. See Gov't Code § 552.007; Open Records Decision Nos. 518 (1989), 454 (1986), 436 (1986), 435 (1986).